

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JOHN LOFLAND,)
) C.A. No. 08A-11-003 JTV
Appellant/Claimant,)
)
v.)
)
ECONO LODGE,)
)
Appellee/Employer.)

Submitted: May 22, 2009

Decided: August 31, 2009

Walt Schmittinger, Esq. and Kristi Vitola, Esq., Schmittinger & Rodriguez, P.A.,
Dover, Delaware. Attorneys for Appellant.

Andrew J. Carmine, Esq. and Nathan V. Gin, Esq., Elzufon, Austin, Reardon,
Tarlov & Mondell, Wilmington, Delaware. Attorneys for Appellee.

*Upon Consideration of Appellant's Appeal
From Decision of the Industrial Accident Board*

AFFIRMED

VAUGHN, President Judge

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OPINION

The claimant, John Lofland, appeals a decision of the Industrial Accident Board awarding him attorney's fees in connection with his successful Petition to Determine Compensation Due. The claimant's appeal is limited to the amount of attorney's fees awarded.

FACTS

In September 2006, the claimant sustained a work-related back injury while employed by the appellee, Econo Lodge. The claimant filed a Petition to Determine Compensation Due before the Board, seeking a finding that his injury was compensable, and an award of total disability benefits, medical expenses, and attorney's fees. The employer contended that the injury did not occur while the claimant was at work, and that the claimant was not totally disabled. A Hearing Officer heard arguments on the petition on August 27, 2008.

On October 17, 2008, the Board issued its decision granting the claimant's petition. The Board found that the claimant's injury was causally related to his workplace accident, and it awarded the claimant the entirety of the disability benefits and medical expenses sought. Specifically, the Board awarded \$626.66 in total disability benefits from February 18, 2007 through March 3, 2007; \$3,506.10 in partial disability benefits from February 10, 2007 through February 17, 2007 and from March 10, 2007 through June 16, 2007; and \$5,573.35 in medical expenses. The Board determined that one attorney's fee in the amount of thirty percent of the

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award or \$9,077.30, whichever is less, was reasonable.¹ The claimant filed the instant appeal on November 6, 2008.

PARTIES' CONTENTIONS

The claimant contends that the Board improperly limited its attorney fee award in two respects. First, the claimant maintains that the Board should have considered the claimant's non-monetary success on the issue of compensability in determining a reasonable amount of attorney's fees to award. The claimant interprets Delaware

¹ The Board's analysis with respect to its award of attorney's fees reads, in part:

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Econo Lodge in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. Claimant's counsel submitted an affidavit attesting to thirty-five hours of preparation for this two hour hearing. This case was not novel or difficult, nor did it require exceptional legal skills to try properly. It was argued that acceptance of this case precluded other employment by Claimant's counsel. I considered the fees customarily charged in this locality for similar legal services, the amounts involved and the results obtained. I also considered the argument that this case posed time limitations upon Claimant's counsel, the date of initial contact on October 8, 2007, and the relative experience, reputation, and ability of Claimant's counsel. It was argued that the fee was contingent, that Claimant's counsel does not expect to receive compensation from any other source, and that the employer is able to pay an award.

....

In the case at hand, based on the results obtained, information presented and Econo Lodge's failure to argue that an attorney's fee award is not appropriate, I find that one attorney's fee in the amount of thirty-percent of the award or \$9,077.30, whichever is less, is reasonable. This award is reasonable given Claimant's counsel's level of experience and the nature of the legal task.

Lofland v. Econo Lodge, IAB Appeal No. 13096243, at 16-17 (Aug. 27, 2008) (citations omitted).

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case law to hold that “[i]ntangible, non-monetary benefits are the proper basis for an award of attorneys’ fees.”

The claimant also argues that the fee awarded in this case does not reflect a reasonable hourly rate for counsel’s services. The claimant notes that thirty percent of the Board’s award comes to \$2,805. Based on thirty-five hours of preparation for a two hour hearing, the claimant contends, the attorney’s fee awarded by the Board amounts to \$80 per hour. The claimant submits that \$80 per hour is a disproportionately low fee, and that the Board typically awards fees in the range of \$260 to \$325 per hour for experienced counsel. The claimant also cites a Board case in which an inexperienced attorney was awarded \$203.04 per hour.

The claimant further contends that the Board did not articulate its findings of fact and conclusions of law with sufficient detail to permit a reviewing court to determine how the Board reached its decision. The claimant submits that there is no way to discern how the Board applied the mandatory factors set forth in *General Motors v. Cox*.²

The employer counters that the Board properly awarded an attorney’s fee within the statutory parameters. The employer contends that, under the same Delaware law cited by the claimant, the Board may, but is not required to, consider non-monetary benefits in its attorney fee calculation. The employer contends that the Board adequately addressed the issue of attorney’s fees in its October 2008 decision, and it arrived at an appropriate sum reflective of the substantial nature of the

² 304 A.2d 55 (Del. 1973).

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claimant's recovery.

As to the claimant's argument that the Board's attorney fee award was disproportionately low, the employer notes that if the Board had awarded \$325 per hour as advocated by the claimant, the total attorney's fee would have been \$11,375 – a sum exceeding the claimant's award of benefits by \$1,670. The employer concludes that the Board properly discussed all of the *Cox* factors in its opinion and provided this Court with sufficient information to make an informed decision on appeal.

STANDARD OF REVIEW

In an appeal from the Industrial Accident Board, the court examines the record for any errors of law and determines whether substantial evidence supports the findings below.³ Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴ The court “does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions.”⁵ Only when there is “no satisfactory proof” of a factual finding of the Board may an appellate court

³ *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Jepsen v. State*, 2005 WL 578801, at *1 (Del. Super. Feb. 24, 2005).

⁴ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

⁵ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *see also Histed*, 621 A.2d at 342 (“When factual determinations are at issue, we must take due account of the experience and specialized competence of the Board and of the purposes of our workers’ compensation law.”).

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overturn it.⁶ Errors of law are reviewed de novo.⁷ Absent an error of law, the standard of review for a Board decision is abuse of discretion.⁸

DISCUSSION

An award of attorney's fees incident to an award of compensation for an industrial accident is statutorily controlled.⁹ Section 2320(10) of the Workers' Compensation statute provides:

A reasonable attorney's fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title and axed as costs against a party.¹⁰

The purpose of Section 2320(10) is to "relieve a successful claimant of the burden of legal fees and expenses, at least in part."¹¹

Absent an abuse of discretion or an error of law, an award of attorney's fees by the Board will not be disturbed by the court.¹² "The Board abuses its discretion when

⁶ *Johnson*, 213 A.2d at 67.

⁷ *Jepsen*, 2005 WL 578801, at *1.

⁸ *Id.*

⁹ *Digiacommo v. Bd. of Pub. Educ. in Wilmington*, 507 A.2d 542, 545 (Del. 1986).

¹⁰ 19 *Del. C.* § 2320(10)(a).

¹¹ *Ham v. Chrysler Corp.*, 231 A.2d 258, 263 (Del. 1967).

¹² *Woodall*, 2004 WL 2735455, at *3.

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it exceeds ‘the bounds of reason in view of the circumstances’ and ignores ‘recognized rules of law or practice so as to produce injustice.’”¹³ If the record reflects that the Board based its decision on improper or inadequate grounds, an abuse of discretion has occurred and the decision must be reversed.¹⁴ The Board has discretion in calculating the amount of reasonable attorney’s fees to award, but it must exercise this discretion in a manner consistent with the purposes of the Worker’s Compensation Act.¹⁵

In arriving at a reasonable fee, the Board must consider the factors set forth in *General Motors Corp. v. Cox*.¹⁶ “All of the factors must be considered to make an

¹³ *Id.* (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

¹⁴ *Taylor v. Walton Corp.*, 2002 WL 264447, at *2 (Del. Super. Feb. 22, 2002).

¹⁵ *Id.*

¹⁶ *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 659 (Del. 2008). The *Cox* factors for determining the reasonableness of an attorney’s fee award are:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fees customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

Gen. Motors Corp. v. Cox, 304 A.2d 55, 57 (Del. 1973). In addition, the Board should consider the employer’s ability to pay, and whether the Board’s award is the exclusive source of the attorney’s

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appropriate determination of attorney’s fees, and to provide the court with sufficient information on appeal to make an informed decision.”¹⁷ The Board’s failure to account for all of the factors is an abuse of discretion.¹⁸ However, the Supreme Court has recently held that the *Cox* factors are guidelines, not mandatory rules, and “the record need only show that the Board considered the *Cox* factors in reaching its decision.”¹⁹

The first issue raised by the claimant on appeal is whether the Board improperly discounted the claimant’s non-monetary success—namely, the Board’s finding that his injury was compensable—in determining the amount of attorney’s fees to award.

The Supreme Court has recently considered the issue of awarding attorney’s fees based on the non-monetary benefits secured for a claimant by counsel. In *Pugh v. Wal-Mart Stores, Inc.*,²⁰ the court rejected a claimant’s argument that the Board’s failure to include non-monetary benefits²¹ in its attorney fee calculation constituted

fees. *Pollard v. The Placers, Inc.*, 703 A.2d 1211, 1212 (Del. 1997).

¹⁷ *Roland v. Playtex Prods., Inc.*, 2003 WL 21001022, at *2 (Del. Super. Feb. 3, 2003).

¹⁸ *Id.*

¹⁹ *Day & Zimmerman*, 965 A.2d at 659.

²⁰ 945 A.2d 588 (Del. 2008).

²¹ The claimant cited as “non-monetary benefits” the Board’s determination that she suffered a compensable injury; recognition that the Board had jurisdiction over her claim; recognition of the 5-year statute of limitations; and the possibility of future permanency and disfigurement benefits. *Id.* at 591.

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an abuse of discretion. The court acknowledged that “a fee award may be based on non-monetary benefits.”²² However, the court upheld the Board’s attorney fee award of \$400, or 30% of the disability benefit amount secured by the claimant, which equaled the statutory maximum. The court held that, “in determining a reasonable fee award, the Board may (although it is not required to) include the value of a finding of compensability and related unliquidated benefits.”²³ The court further reasoned that, while every disability award is necessarily accompanied by findings of compensable injury, Board jurisdiction, and a five year statute of limitations, “[t]hose non-monetary benefits do not automatically translate into an additional sum beyond the amount determined by reference to the monetary award.”²⁴ As to the claimant’s argument that the Board believed it was precluded from awarding a higher attorney fee accounting for non-monetary benefits, the court found that the Board was mistaken; however, the Board’s mistake did not vitiate the award, as “nothing in the statute or case law requir[es] the Board to value the non-monetary benefits and then include that value in the fee calculation.”²⁵

Another recent Supreme Court case reaffirmed the holding in *Pugh* under

²² *Id.*

²³ *Id.* at 590.

²⁴ *Id.* at 591.

²⁵ *Id.*

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similar factual circumstances. In *Mitchell v. Purdue, Inc.*,²⁶ the court cited *Pugh* for the proposition that, “while the Board is *permitted* to consider the non-monetary benefits gained for the claimant by counsel, the Board is not *required* to do so in its fee calculation.”²⁷ The court reasoned that the claimant, Mitchell, bore the burden of establishing his entitlement to an award of attorney’s fees. It held that, “[b]ecause [the claimant] did not request that the Board consider non-monetary benefits, the Board did not abuse its discretion by not doing so.”²⁸ In so holding, the court rejected the claimant’s argument that the existing IAB procedures did not provide an opportunity to make a separate, tailored request for attorney’s fees after resolution of the underlying issues in the case.²⁹

Pugh and *Mitchell* are directly controlling in the instant case. The Board could have, in its discretion, considered its finding that Mr. Lofland’s injury was

²⁶ 2009 WL 1418127 (Del. May 21, 2009). At the time of the parties’ briefing, the case was on appeal awaiting a decision of the Supreme Court. The claimant’s contention that the Superior Court decision in the case, *Mitchell v. Purdue, Inc.*, C.A. No. SS08A-04-002 (Del. Super. Oct. 20, 2008), is not precedential authority is now moot.

²⁷ *Mitchell*, 2009 WL 1418127, at *2 (emphasis in original); *see also id.* (“As we noted in *Pugh*, because every award of monetary benefits to a claimant is necessarily accompanied by a finding of causation, that non-monetary benefit does not automatically increase the base upon which attorneys’ fees are calculated. The Board has discretion to consider such a benefit, but it is not required to do so.”).

²⁸ *Id.*

²⁹ *Id.* at *3. While the court noted that the trial judge advised future claimants to make a direct or explicit claim for a larger fee award on the basis of non-monetary benefits, it found that the judge’s decision was premised on its correct application of *Pugh*, and not on the claimant’s failure to comply with a procedural rule. *Id.*

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compensable in calculating its attorney fee award; however, it was not required to do so as a matter of law. To the extent that the claimant cites a perceived deficiency in IAB procedures, the Supreme Court has ruled that such an argument is without merit. The Board did not err in awarding the claimant one attorney's fee on the basis of his substantial monetary recovery alone.

The claimant's second basis for appeal is that the Board awarded an unreasonably low attorney's fee, amounting to \$80 per hour. The claimant cites *Vaughn v. Genesis Health Ventures*,³⁰ in which the court held that a \$450 attorney fee award was "totally out of proportion to the benefit incurred by the Claimant."³¹ *Vaughn* is readily distinguishable from the instant case. In that case, the Board's *Cox* analysis was patently inadequate:

The Board further finds Claimant is entitled to an attorney's fees [sic] taxed as costs against Employer pursuant to 19 *Del. C.* § 2320(g). Counsel has represented Claimant since August 1999. The issues before the Board were moderate to complex in nature and Claimant's counsel spend [sic] approximately fourteen hours in preparation for the hearing. The Board finds \$450 is a reasonable attorney's fee.³²

The court found that the Board "did not attempt to justify the reasons for its award," as it failed to account for the legal fees customarily charged in the locality for similar

³⁰ 2000 WL 1211221 (Del. Super. Aug. 21, 2000).

³¹ *Id.* at *3.

³² *Id.*

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services; the amount of the award involved; the experience, reputation, and ability of the attorney; and whether or not the fee was contingent.³³ The Board also failed to consider the fact that the claimant's attorney had spent fourteen hours preparing for the hearing.³⁴ A similar holding was reached in *Woodall v. Playtex Prods., Inc.*,³⁵ in which the Superior Court reversed a Board decision awarding a claimant \$250 in attorney's fees ancillary to an award for disfigurement. The Board's *Cox* analysis in that case was even less satisfactory, taking into account only the time involved, the result obtained, and the complexity of the claimant's application for benefits.³⁶ The court held that the Board's failure to give adequate consideration to the *Cox* factors was an abuse of discretion.³⁷

³³ *Id.*

³⁴ *Id.*

³⁵ 2002 WL 749188 (Del. Super. Apr. 26, 2002).

³⁶ *Id.* at *1.

³⁷ For similar Superior Court cases overturning a low attorney fee award on the basis of the Board's failure to give due consideration to all ten *Cox* factors, see *Roland v. Playtex Prods., Inc.*, 2003 WL 21001022, at *2 (Del. Super. Feb. 3, 2003) ("It would have been helpful to this Court if the IAB directly referred to each *Cox* factor, citing the factor and the findings for this Court to review if necessary."); *Willis v. Plastic Materials, Co.*, 2003 WL 164292, at *2 (Del. Super. Jan. 13, 2003) (citations omitted) ("The court cannot exercise its function on appeal if the Board does not make adequate findings concerning each of the *Cox* factors. In several recent cases the court has reversed the Board's decision concerning attorney's fees due to the Board's failure to do so."); *Taylor v. Walton Corp.*, 2002 WL 264447, at *4 (Del. Super. Feb. 22, 2002) (quoting *City of Wilmington v. Clark*, 1991 WL 53441, at *8 (Del. Super. Mar. 20, 1991)) ("[The Court] 'should not be compelled to speculate or make assumptions' as to what factors the Board considered in making its determination.").

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In this case the Board adequately addressed all ten *Cox* factors in its opinion. The Board noted that claimant's counsel submitted an affidavit reflecting thirty-five hours of preparation for a two hour hearing; the case was not novel or difficult; it did not require exceptional legal skill; acceptance of the case precluded other employment by claimant's counsel; the case imposed time limitations upon counsel; the date of initial contact was October 8, 2007; the fee was contingent; counsel did not expect to receive compensation from any other source; and the employer was able to pay the award. The Board also factored in the fees customarily charged in this locality for similar legal services, the amounts involved, the results obtained, and the relative experience, reputation, and ability of counsel. The court is not left to speculate about the Board's reasoning, as was the case in *Vaughn and Woodall*. Under the law as set forth by the Supreme Court, the record need only show that the Board *considered* the *Cox* factors in reaching its decision with respect to attorney's fees.³⁸

Having dispensed with the claimant's arguments that the Board's reasoning was inadequate and that its attorney fee award was disproportionately low when compared to other Board awards (which do not carry precedential weight in this Court), it is clear that the claimant cannot overcome the plain language of Section 2320(10) and its proper—even favorable—application by the Board. The statute provides that a reasonable attorney's fee may be awarded in an amount *not to exceed* the lower of thirty percent of the award—here a figure between \$2,805 and \$2,911.83,

³⁸ *Day & Zimmerman*, 965 A.2d at 659.

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or ten times the average weekly wage in Delaware at the time of the award—here \$9,077.30. The Board properly exercised its discretion to award one attorney’s fee, and it awarded the maximum sum under the statute.³⁹

Based on the foregoing, the decision of the Industrial Accident Board is ***affirmed.***

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
File

³⁹ See *Roland*, 2003 WL 21001022, at *3 (“[I]t is clear from the language of § 2320 that the 30% figure is a ceiling for how much the IAB *may* award.”).